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No. 96-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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The government does not and cannot reconcile the Eleventh Circuit's decision with *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) — in particular, *Sullivan*'s holding that "the entire premise of *Chapman* review is simply absent" in the case of an incomplete jury verdict because "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Id.* at 280 (emphasis in original). The government's failure to do so is hardly surprising, for *Sullivan* unequivocally forecloses any application of the harmless-error doctrine to this case. Unable to challenge the bedrock constitutional rule that appellate courts may not supply findings of guilt on elements never found by the jury, the government proposes to carve out a far-fetched and unprincipled exception to that rule.

Echoing the reasoning of the court of appeals, the government argues that the trial court's erroneous omission of *mens rea* from the jury's instructions is subject to harmless-error review because "it remove[d] *only one* element from the jury's consideration." U.S. Br. 18 (emphasis added). As explained in petitioner's opening brief, however, it is constitutionally meaningless how many elements were omitted from the jury's consideration. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all* the elements of the crime with which he is charged" *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995) (emphasis added). If, as the government claims, it is constitutionally permissible to affirm a conviction where the jury has not found one of the essential elements of the crime, why would that not also be true if two or three elements were omitted? Although this very question is posed in petitioner's opening brief (at 45), the government offers no answer.

The government also argues that this particular case is special because petitioner made testimonial admissions concerning the omitted element, and that admissions are

somehow *sui generis* and can therefore substitute for a jury's missing findings. Testimonial admissions by a defendant, however, are no different than any other form of evidence. Unlike a guilty plea, an admission is not self-defining. For this reason, courts and commentators have recognized for more than a century that the character and weight of an admission is for the jury to evaluate in the context of all of the evidence, including the circumstances surrounding the admission itself. For a reviewing court to declare harmless the omission of an essential element on the basis of a testimonial admission thus would be the same as declaring the error harmless on the ground that the evidence concerning the omitted element was "overwhelming" — a result plainly forbidden by *Sullivan*.

Unable to explain how the Constitution allows a conviction to stand where the jury has not found every element of a crime beyond a reasonable doubt, the government is compelled to skip ahead and defend the court of appeals' decision based on the weight of the evidence. According to the government, any error that is "harmless" based on the evidence of guilt must, *ipso facto*, be amenable to harmless-error review because "[r]eversal in those circumstances would vindicate no cognizable individual right and no valid societal purpose." U.S. Br. 14.

Whether a particular error is amenable to harmless-error scrutiny, however, has nothing at all to do with the nature or strength of the *evidence*. It depends entirely on the nature of the *error*. Thus, a structural error is "not curable by overwhelming record evidence of guilt." *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring) (citing *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408-09 (1947)). In this case, a straightforward application of this Court's harmless-error decisions compels the conclusion that the trial court's instructional omission "unquestionably qualifies as 'structural error,'" for all an appellate court can do when faced

with such an error is to offer its own "view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281-282 (quoting *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)).

In this case, it is undisputed that the trial court removed the essential element of *mens rea* from the jury's consideration, and that none of the jury's findings on other elements embraced the omitted element. Under *Sullivan*, the harmless-error doctrine cannot apply to such an "admittedly inchoate adjudication of guilt," nor can it be used by a court to supply factual findings of guilt that the jury never made. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., joined by Ginsburg, J., concurring).

I. FAILING TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CANNOT BE "HARMLESS" WHERE IT RESULTS IN AN INCOMPLETE JURY VERDICT.

The government entirely fails to come to grips with this Court's decisions limiting the harmless-error doctrine to cases in which a jury entered a complete verdict, and forbidding its use to supply findings on elements that the jury never considered. See Pet. Br. 14-33.[1] Indeed, the government cannot reconcile the court of appeals' decision with either of these constitutional limitations on the harmless-error doctrine. Instead, the government unabashedly urges this Court to declare

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[1] Unable to rebut the argument that omission of an essential element is a "structural error," the government wrongly suggests that "petitioner's claim is not that a *Staples* error is 'structural' and immune from [harmless-error] review, but that the court of appeals used an improper method of harmless-error analysis in finding this particular error harmless." U.S. Br. 13. As petitioner's brief makes quite clear, it is indeed petitioner's contention that the omission of an essential element is a structural error. See Pet. Br. 22-26.

that it is constitutionally permissible to uphold the conviction of a person even if the jury has not found all of the elements of the crime beyond a reasonable doubt, so long as "*only one* element of the offense is omitted." U.S. Br. 23 (emphasis added). Alternatively, the government insists that harmless-error review is permissible because the evidence concerning the omitted element purportedly was "overwhelmingly established and essentially undisputed." *Id.* at 24. As we demonstrate below, these contentions patently misapply the harmless-error doctrine and ignore the constitutional limits on its use.

A. The Government's Arbitrary "One Element" Exception Is Contrary To This Court's Harmless-Error Decisions.

The government does not deny that the trial court's omission of the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994), removed from the jury's consideration an essential element of the offenses charged and resulted in a constitutionally incomplete verdict. See *Gaudin*, 515 U.S. at 512. The government also does not deny that the trial court's removal of the *Staples* element was the equivalent of a directed verdict on that element, and that a directed verdict cannot constitutionally be harmless. See Pet. Br. 17-19.[2] And,

[2] The government (Br. 32) cites Justice Blackmun's statement in his *Connecticut v. Johnson* plurality opinion that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue." 460 U.S. at 84-85. Perhaps the government means to suggest that this Court's subsequent decision in *Rose* v. *Clark*, which held that conclusive presumptions are subject to harmless-error review, somehow sanctioned the application of harmless-error review to directed verdicts. In fact, *Rose* held that a conclusive presumption was subject to harmless-error review precisely because it was *not* equivalent to a directed verdict. As the Court explained, quoting Justice Powell's dissenting opinion in *Johnson*, "[b]ecause a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (citation omitted). *Rose* also expressly stated that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." *Id.* at 578.

while downplaying their significance as stray "language in some * * * recent * * * decisions," it also acknowledges this Court's unequivocal warnings that an appellate court may not invoke harmless-error review to supply findings on element that were not found by the jury. U.S. Br. 24-25 & n.10 (citing, *e.g.*, *Sullivan*, 508 U.S. at 280). See also *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring).

To preserve petitioner's conviction, then, the government takes the only course it can: asking the Court to transform the harmless-error doctrine by holding that it is permissible to uphold a conviction rendered on an incomplete guilty verdict as long as the jury instructions "correctly set forth all of the elements of an offense *but one*" and "removed *only one* element from the jury's consideration." U.S. Br. 13, 18 (emphasis added).[3] The government's "one element" theory suffers from two fatal flaws. First, it is contrary to the constitutional foundations of the harmless-error doctrine as articulated by this Court. Second, even if it were not foreclosed by precedent, the government's theory makes no sense.

The government simplistically reasons that because this Court has held that certain instructional errors involving single elements "can be harmless in at least some cases" (U.S. Br. 17), the complete omission of a single element *also* must be amenable to harmless-error review. The government's analysis,

[3] See also U.S. Br. at 23 (rule established in *Sullivan* should not apply where "only one element of the offense is omitted"); *id.* at 24 (contending that it is appropriate to apply harmless-error analysis to "a single-element instructional omission"); *id.* at 37 n.17 (attempting to distinguish "single-element instructional error" from error affecting all elements).

however, entirely ignores *why* the Court found those particular single-element errors to be subject to harmless-error review. It is true that in each of the cases the government cites — *Yates* v. *Evatt*, 500 U.S. 391 (1991); *Rose* v. *Clark*, 478 U.S. 570 (1986); *Carella* v. *California*, 491 U.S. 263 (1989); and *Pope* v. *Illinois*, 481 U.S. 497 (1987) — the Court found that an instructional error was susceptible to harmless-error scrutiny and the error in question involved only a single element of the offense. But the Court's holdings in these cases had nothing to do with the *number* of elements at issue. Rather, it was the *nature* of the instructional error that allowed for harmless-error review. As this Court explained in *Sullivan*, 508 U.S. at 280-281, each of the cases cited by the government involved circumstances where a complete verdict was entered by the jury on *all* of the elements, and where the appellate court could declare the instructional error harmless *based on what the jury actually found*. See Pet. Br. 27-33.[4]

Apart from the absence of any support in this Court's precedents, the government's "one element" exception is wholly unprincipled. If the omission of a single element is susceptible to harmless-error review, why not two elements, or even three? Notably, the government never answers this question, which was squarely posed by petitioner. Pet. Br. 45. That is because there is no answer. A constitutionally incomplete verdict is a constitutionally incomplete verdict, regardless of whether it

[4] The government tries to distinguish *Sullivan* on the ground that "*Sullivan* did not involve the distinct type of error at issue here: an instructional omission (or misdescription) of a single element of an offense." U.S. Br. 22. This distinction, however, only supports petitioner. As Chief Justice Rehnquist noted in *Sullivan*, one could debate whether the error in *Sullivan* was structural because it did not "remove[] an element of the offense from the jury's consideration or prevent[] the jury from considering certain evidence." 508 U.S. at 283-284 (concurring opinion). Here the trial court's error *did* entirely remove an element from the jury's consideration.

arises from the omission of one, two or three elements. *Gaudin* itself was a "one element" case. So was *Carpenters*. Yet nowhere did the Court suggest that the constitutional error in either case was somehow mitigated by the fact that it concerned "only one element."[5] To the contrary, this Court reaffirmed the Constitution's requirement that a guilty verdict "rest upon a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510 (emphasis added).

The government's "one element" exception also makes no practical sense, as its own brief confirms. For instance, the government appears to believe that its proposed exception would apply only where the trial court omits an *important* element of the crime charged — a course implicit in its argument that the jury instructions below merely omitted the "*limited* scienter element" required by *Staples*. U.S. Br. 38 (emphasis added). One might also question whether the government's attempt to trivialize this scienter element accurately reflects the Court's opinion in *Staples*. See *Staples*, 511 U.S. at 615-619. But in any event, the essential point is that *any* effort to distinguish an "outcome-determinative" element (U.S. Br. 25 n.10) from "a relatively straightforward and technical element of an offense" (*id.* at 23) is untenable.

[5] Even the government is unwilling to take its own position to its logical conclusion. The government concedes that "[i]f a defendant were to admit *every* element of his offense at trial and then, in outright disregard of established legal rules, the district court were to enter a judgment of conviction without submitting the case to the jury at all, reversal would be warranted." U.S. Br. 37 (emphasis added). Thus, according to the government, it would be constitutionally permissible to convict a person if *one* element of the crime is omitted, but not if *all* of the elements are omitted. Why this is so, the government does not say.

"A jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime" *Roy*, 117 S. Ct. at 338 (Scalia, J., joined by Ginsburg, J., concurring). If the jury has not found every element beyond a reasonable doubt, "there [is] no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280 (emphasis in original).

B. The Applicability Of The Harmless-Error Doctrine To A Particular Error Depends Upon The Nature of The Error, Not The Strength Of The Evidence.

The government's brief ultimately abandons its effort to reconcile the court of appeals' decision with this Court's harmless-error decisions, focusing most of its effort to urging this Court to permit the use of harmless-error review because the evidence concerning the omitted *mens rea* element was "overwhelming." U.S. Br. 20-22. In short, the government would have the Court simply overlook the step of determining whether the error below is subject to harmless-error analysis, and declare that any error which is "harmless" based on the evidence must, *ipso facto*, be amenable to harmless error scrutiny. The government's argument is futile, because, as *Sullivan* makes clear, the applicability of harmless-error review has nothing do with the nature or strength of the evidence.

As the government concedes, the first question in any harmless-error case is whether the error is "amenable to harmless-error review at all." U.S. Br. 15. See also *Chapman*, 386 U.S. at 20; Pet. Br. 14. Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether, in light of the evidence adduced at trial, the error actually was harmless. *Sullivan*, 508 U.S. at 280. Whether an error is of the "structural" sort that "def[ies] analysis by 'harmless-error' standards," (*Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)), has nothing to do with the

evidence. A "structural" error, by definition, "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. For example, when a jury is constituted in a racially discriminatory fashion (see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986)), or a defendant is denied a public trial (see *Waller* v. *Georgia*, 467 U.S. 39 (1984)), it makes no difference that the evidence of guilt may be viewed by an appellate court as overwhelming. Such errors are structural, and hence not susceptible to harmless-error review, "no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277.

Where, as here, there is an "admittedly inchoate, adjudication of guilt" (Pet. App. 12a n.12) because the jury has not found the defendant guilty of every element of the offense charged, the error is "structural," and thus immune from harmless-error scrutiny, because there is nothing an appellate court can do to alter the fact that "the wrong entity judge[d] the defendant guilty." *Sullivan*, 508 U.S. at 281. No amount of evidence can show the jury found what it never considered — or, in this case, was instructed *not* to find.

Thus, the government's self-serving (and incorrect) assertion that the trial court's instructional omission "would not have affected a rational jury's determination that petitioner was guilty" (U.S. Br. 14-15) is beside the point. "The absence of a formal verdict on [an element] cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring). "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty- beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless."

Sullivan, 508 U.S. at 280.[6] Here, it is undisputed that the trial court removed the element of *mens rea* from the jury's consideration, and that thus there was no verdict within the meaning of the Constitution. As such, the most an appellate court would be able to do is speculate about what a reasonable jury would have decided had it considered the omitted element. "That is not enough." *Sullivan*, 508 U.S. at 280.

II. OMISSION OF AN ESSENTIAL ELEMENT IS IMMUNE FROM HARMLESS-ERROR REVIEW EVEN IF THE DEFENDANT "ADMITS" THE OMITTED ELEMENT.

Undaunted by the absence of a complete jury verdict, the government insists that the error in this case is harmless because of "the special status of sworn admissions by a defendant at trial." U.S. Br. 28. Relying upon the Court's decision in *Motes* v. *United States*, 178 U.S. 458, 476 (1900), the government posits a distinction "between evidence introduced against a defendant by the prosecution and testimonial admissions made by a defendant on the witness

[6] The government acknowledges that "language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on 'overwhelming evidence' to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error." U.S. Br. 24 (citing *Sullivan*, 508 U.S. at 280; *Yates*, 500 U.S. at 404; *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring)). It argues, however, that "other decisions have acknowledged that, at least in some contexts, a reviewing court may take into account what the jury necessarily would have found if improperly excluded evidence had been admitted or if incorrect instructions had been correct." U.S. Br. 25-26 (citing, *e.g.*, *Pope*, 481 U.S. at 503 & n.6; *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986)). What the government ignores, however, is that *each* of the cases it cites was decided in the "context" of a complete jury verdict, where the reviewing court's role was limited to determining whether the jury's actual and *complete* verdict would have been different; not speculating what a jury would have found on an element it never considered. See Pet. Br. 27-33.

stand." U.S. Br. 27. While it apparently concedes that the former are "'simply pieces of evidence'" that the jury may accept or reject in reaching its verdict, the government argues that the latter may be used by an appellate court as a substitute for jury findings because "'[i]t would be trifling with the administration of the criminal law'" to require a jury to find what a defendant seemingly has admitted by his own testimony. *Id.* at 28-29. Whatever its superficial appeal, the government's analysis cannot withstand scrutiny.

A. The case on which the government relies, *Motes* v. *United States*, 178 U.S. 458 (1900), involved an evidentiary error, not an instructional omission. It therefore has no bearing on the question presented here. *Motes* was unremarkable when it was decided, and remains so today under modern harmless-error standards, since it is well established that the wrongful exclusion or admission of evidence is properly subject to harmless-error review in cases where a complete verdict is entered by the jury. See, *e.g.*, *Fulminante*, 499 U.S. at 310.

There was no instructional error discussed or implied in *Motes*, and certainly nothing in the Court's decision even remotely suggests that a defendant's testimonial admissions can serve as a substitute for jury findings on an omitted element. Rather, the Court set aside the convictions of all but one of the defendants because their rights under the Confrontation Clause were infringed by the admission of a statement by an alleged co-conspirator who implicated the other defendants in the crime, but who was unavailable at trial because he had escaped government custody. 178 U.S. at 471. The Court found, however, that the remaining defendant's in-court admission of guilt constituted "enough * * * to require a verdict of guilty as to him, even if the jury had disregarded" the erroneously admitted statements. *Id.* at 475. As the Court briefly noted, "[t]he admission of the statement of [the co-conspirator] was * * * of no consequence" to the jury given the defendant's own

confession on the witness stand. *Ibid.* Viewed in *Chapman* terms, *Motes* simply held "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. It thus reflects a straightforward example of harmless-error review in a setting where an admission may indeed be significant. *Cf. Carella*, 491 U.S. at 270 (Scalia, J., concurring). In short, *Motes* cannot bear the weight the government places on it. And that *Motes* is the only authority the government can muster speaks volumes to the poverty of its position.[7]

B. The government's claim that testimonial admissions may constitutionally be used by a reviewing court to "fill in the gaps" of an incomplete jury verdict also is fatally flawed because it ascribes a talismanic significance to admissions that they simply do not have. To begin with, it is uncontested that a defendant's admissions in no way relieve the government's burden of proof. See *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991). More importantly, unlike guilty pleas, admissions from

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[7] The government points to the plurality's statement in *Connecticut* v. *Johnson* that a "*Sandstrom* error may be harmless if the defendant conceded the issue of intent" (460 U.S. at 87), and then challenges petitioner to "explain why an admission as to intent would render *Sandstrom* error harmless," but not the omission of an element. U.S. Br. 32. In fact, as explained in petitioner's opening brief (at 30 n.9), the reason why an admission can render a *Sandstrom* error harmless is apparent from *Johnson* itself, *i.e.*, because an admission may in some cases "sufficiently reduc[e] the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless." 460 U.S. at 87. As Justice Scalia later explained in *Carella*, an admission can render the use of a conclusive presumption harmless precisely because it represents one of the "'rare situations' when 'the reviewing court can be confident that [such an] error did not play any role in the jury's verdict." 491 U.S. at 270 (concurring opinion) (quoting *Johnson*). The same cannot be said of an instructional omission because the jury did not make any finding whatsoever on the element in question.

the witness stand are not self-defining. They are made in the context of the record evidence as a whole, and their weight can only reliably be assessed by the jury in light of all of the circumstances in which they were made.

Like a confession, a testimonial admission could be crucially significant, or have little or no probative value, depending on the circumstances. See, *e.g.*, 2 McCormick, *Evidence* § 258, at 153-155 (4th ed. 1992); 4 Wigmore, *Evidence* §§ 1058-1059, at 26-27 (Chadbourn rev. 1972); M.H. Graham, *Handbook of Federal Evidence* § 801.26, at 812-814 (3d ed. 1991). Thus, "[w]hen a party testifying at trial * * * admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission," not as a conclusive judicial admission. *Keller v. United States*, 58 F.3d 1194, 1197 n.8 (7th Cir. 1995) (citing Graham § 6726, at 536-537). Dean Wigmore likewise urged the courts to resist the "temptation to accept [the] principle" that "a party's testimony on the stand as a witness may sometimes amount to a judicial admission." 9 Wigmore, *Evidence* § 2594a, at 834 & 844 (Chadbourn rev. 1981). As Wigmore explained, because testimonial admissions are made during the heat of trial and in the context of a conversational exchange, their meaning and weight cannot be determined in the same fashion as a formal stipulation or judicial admission:

> Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory stirring between all concerned. * * * The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself.

Id. at 844. McCormick echoed this sentiment, stressing that a "party's testimony, uttered by a layman in the stress of examination, cannot with justice be given the conclusiveness of the traditional judicial admission in a pleading or stipulation." McCormick, *supra*, at 155.

A "true" admission, as Wigmore explained, "is a *formal* act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true." 4 Wigmore, *Evidence* § 1058, at 26-27 (emphasis added). It is "conclusive, in the sense that it formally waives all right to deny, for the purposes of the trial, *i.e.*, it removes the proposition in question from the field of disputed issues." *Ibid.* By contrast, a "quasi" admission is simply "an item in the mass of evidence," *id.*, § 1058, at 26, and is "*not in any sense final or conclusive.*" *Id.* at 27 (emphasis in original). See also 9 Wigmore, § 2588, at 821 (noting that a "judicial admission is sharply marked off from the ordinary or quasi-admission * * * [which] is merely an item of evidence").[8]

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[8] Although, as the government points out (U.S. Br. 33 n.16), Wigmore's discussion focuses largely on civil proceedings, the government offers no rationale for treating admissions at a criminal trial any differently than those in a civil trial. If anything, admissions in a criminal case should be accorded *less* conclusive weight because they are made without the "care and discernment" of a formal guilty plea. *United States* v. *Hyde*, 117 S. Ct. 1630, 1634 (1997). As this Court observed in *Hyde*, Rule 11 sets forth several "prerequisites to accepting a guilty plea," including that the trial court "ensure the defendant understands the maximum possible penalty that he may face by pleading guilty * * * and the important constitutional rights he is waiving, including the right to a trial." *Id.* at 1633 (quoting Fed. R. Crim. P. 11(c)). *Cf. Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive"). Even a confession — which, after all, is "one species of admission, namely, an admission consisting of an assertion, by the accused

Determining whether the testimony that comprises an "admission" establishes any particular element of a crime beyond a reasonable doubt, particularly an inherently subjective element such as intent or knowledge, necessarily requires an appreciation of the subtle details and nuances of the trial — facets far better observed from the jury box than the appellate bench. Indeed, depending upon the circumstances, the weight of an admission may range from that of conclusive effect to that of marginal significance — a determination surely committed to the jury's judgment. As perhaps best explained by the New York Court of Appeals more than 75 years ago:

> [T]he jury in determining their effect, or probative value or weight, must apply to [admissions] the rule of reason. The effect they have, in reason and sound judgment, upon the mind of the jury, in view of their language, character, the time when and person to whom they were made, the circumstances and conditions attending their making, and the other facts in evidence, is the effect they should have upon the claim of the party. In case they were made in ignorance of the facts or in an abnormal state of mind, or were based in part upon mere opinion, or were made casually or thoughtlessly or insincerely, or under like or analogous conditions or circumstances, they may, in reason, deserve slight consideration or value or none at all. In case they were made understandingly and deliberately, are of

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in a criminal case" (4 Wigmore, § 1050, at 11) — is treated as a testimonial or quasi-admission, not a judicial admission. The trial court thus must "allow[] the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant." *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967). See also *United States* v. *Hall*, 93 F.3d 1337, 1344 (7th Cir. 1996) (it remains "within the jury's province to assess the truthfulness and accuracy of the confession").

> pure fact within the knowledge of the declarant, and were made under conditions and circumstances conducive to veracity, and are not overborne by the other facts in evidence, they may, in reason and sound judgment, establish a cause of action or defense.

Gangi v. *Fradus*, 227 N.Y. 452, 456-457, 125 N.E. 677, 679 (1920). As the New York Court went on to explain, the placement of any testimonial admission along this continuum is exclusively the function of the jury, not the court:

> Whether [admissions] are of the one class or the other, or intermediate, is for the determination of the jury. The effect they shall have upon the issues being tried is for their determination. The trial justice may not instruct as to the rank assignable to them or the influence to be yielded by them. The jury may accept a part as true and put aside a part as not true. In those respects the law has no gauge. *Ibid.*

In short, admissions plainly are capable of more than one interpretation or meaning. Admissions, unlike guilty pleas or stipulations, are simply pieces of evidence whose significance can only be determined by the trier of fact from a complete knowledge and understanding of the trial itself. It is for this reason that the government's argument fails. A reviewing court can declare harmless the omission of an essential element on the basis of testimonial admissions only by weighing the evidence itself and making its own factual findings on the omitted element. As this Court clearly has warned, however, "[f]indings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986).

C. The government also offers no explanation as to how "admissions" practically could serve as a basis for invoking harmless error review. Indeed, the rule it urges would be "an illogical and unworkable deviation from [the Court's] previous cases" (*Nichols* v. *United States*, 511 U.S. 738, 757 (1994)), creating more questions than it answers, and giving the courts of appeals no predictable means of determining whether they can even engage in harmless-error review in the first place.

Since testimonial admissions are not self-defining, and their significance cannot be measured without actually weighing all of the record evidence, a reviewing court asked to find the omission of an essential element harmless based on testimonial admissions would be confronted with a host of fact-based questions, none of which it can constitutionally answer. What precisely is it that the defendant admitted? What were the circumstances in which the defendant made the admission? What did the defendant intend by the admission? What weight should it have? Is there other evidence bearing on its weight? Does the admission establish the omitted element beyond a reasonable doubt?

Even if all of these questions could be answered, and the appellate court is convinced that the defendant's admissions establish the omitted element, the inquiry cannot end there, since the omitted element "may not be judged in artificial isolation." *Estelle*, 502 U.S. at 72. See also J.A. 100 ("you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law") (actual jury charge below). The government assumes throughout its brief that when an element is omitted, the appellate court need only look to the evidence bearing on the omitted element, taking all of the other elements found by the jury as a given. Yet, the omission of an essential element often will impact the jury's consideration of other elements since such an omission requires the jury to consider the remaining

elements of the crime charged out of their actual and proper context, and without a full appreciation of *all* of the elements that constitute the charged offense. See *Boyde* v. *California*, 494 U.S. 370, 379-381 (1990).

In this case, for example, the question of whether petitioner knowingly possessed the silencer in question was a hotly contested issue based entirely on circumstantial evidence. See Pet. Br. 46-47. Petitioner testified that he did not, and never would have, knowingly possessed a silencer because of his experiences in the Vietnam War. *Id.* at 38. It is also undisputed, as explained in petitioner's opening Brief (at 46), that by telling the jury that the government was not required to prove that the defendant knowingly possessed a firearm within the meaning of the law, the jury easily could have believed that possession of an unregistered or unserialized silencer was a strict liability offense. More importantly, without the *Staples* element, the jury, which already had "trouble with its deliberations" (J.A. 109), was forced to assess petitioner's guilt or innocence without considering his central defense that he never would have possessed a silencer *because of* his knowledge or experience with silencers, and without an appreciation of the moral culpability required to establish the offenses charged.[9]

In short, an appellate court asked to declare harmless the omission of an essential element based on testimonial admissions can only do precisely that which the court of appeals did below, *i.e.*, weigh the record evidence and fill in the gaps to cobble together a verdict based on nothing more than its

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[9] The government gratuitously suggests (U.S. Br. 31-32, 34) that what petitioner seeks through a new trial is the opportunity to convince a jury to disbelieve his testimony. Petitioner seeks no such thing. To the contrary, the admissions prominently cited by the government, including petitioner's experience with silencers during the War and his ability to identify silencers, was an essential part of petitioner's defense at trial.

"certainty" that "the verdict * * * would have been the same absent the defective instruction." Pet. App. 17a. Right or wrong, such a finding is "a finding of fact by judges, not by a jury." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). And as *Sullivan* holds, "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." 508 U.S. at 279.

III. OMISSION OF AN ESSENTIAL ELEMENT CANNOT BE SUBJECT TO HARMLESS-ERROR REVIEW IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED.

The government oddly argues that granting a new trial to a person who was convicted of a crime, but who was not found guilty by the jury of every element of the offense charged, "would vindicate no cognizable individual right and no valid societal purpose." U.S. Br. 14. *Nothing* could be further from the truth. Indeed, to hold that removal of an essential element from the jury's purview cannot be harmless is to affirm every individual's constitutional "right to have the jury, rather than the judge, reach the requisite finding of 'guilty'" (*Sullivan*, 508 U.S. at 277) — a guarantee that itself is the "most important element" of the right to a jury trial. *Ibid.* Such a holding also would serve as a clear statement that the jury trial right will be enforced regardless of how appellate courts view the evidence, and would provide the reassurance that one can be found guilty of a crime only "by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'" *Duncan* v. *Louisiana*, 391 U.S. 145, 151-52 (1968) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899)).

Requiring, as a condition of harmless-error scrutiny, that a jury be instructed on every essential element of the crime charged also would preserve the jury's ability to reliably

discharge its function as the arbiter of guilt or innocence by ensuring that every juror will fully appreciate all of the elements that constitute the offense, and assess each element in its proper context. As explained in petitioner's brief (at 45), to grant appellate courts the power to declare harmless the omission of even a single element would grant courts the open license to serve as triers of fact on issues never considered by the jury in the first place. The government does not deny this.

In short, the omission of an element from the jury's instructions, and the resultant failure of the jury to enter a complete verdict concerning the offense charged, must surely be included among the structural errors that defy harmless-error scrutiny. *Sullivan*, 508 U.S. at 281. To hold otherwise "would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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